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Supreme Court, U.S.
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No. 93-7901

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

LLOYD E. SCHLUP, JR.,

Petitioner,

v.

PAUL DELO, Superintendent,
Potosi Correctional Center,

Respondent.

On Writ of Certiorari to The
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

Table of Contents i
Table of Authorities ii
Statement of the Case 1
Summary of the Argument 13
Argument

I. The Court of Appeals properly reviewed petitioner's claim of fundamental miscarriage of justice under the standard set forth in *Sawyer v. Whitley*. 16

II. The Court of Appeals properly applied the *Sawyer v. Whitley* standard to petitioner's claim of fundamental miscarriage of justice. 29

III. Petitioner cannot show by any standard that he meets the fundamental miscarriage of justice exception. 31

Conclusion 41

TABLE OF AUTHORITIES

Cases	Page
Ballinger v. Kerby, 3 F.3d 1371 (10th Cir. 1993)	28
Bullington v. Missouri, 451 U.S. 430 (1981)	24
Clark v. Lewis, 1 F.3d 814 (9th Cir. 1993)	28
Dugger v. Adams, 489 U.S. 401 (1989)	22
Ellis v. Collins, 956 F.2d 76 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1285 (1992)	40
Engle v. Isaac, 456 U.S. 107 (1982)	18
Fay v. Noia, 372 U.S. 391 (1963)	17
Francis v. Henderson, 425 U.S. 536 (1976)	17
Harris v. Reed, 489 U.S. 255 (1989)	14
Herrera v. Collins, 506 U.S. ___, 113 S.Ct. 853 (1993)	21, 29
Hull v. Freeman, 991 F.2d 86 (3d Cir. 1993)	27
Jackson v. Virginia, 443 U.S. 307 (1979)	29, 30
Johnson v. Hargett, 978 F.2d 855 (5th Cir. 1992)	24
Keeny v. Tamayo-Reyes, ___ U.S. ___, 112 S.Ct. 1715 (1992)	24
Kirkpatrick v. Whitley, 992 F.2d 491 (5th Cir. 1993)	27
Kuhlmann v. Wilson, 477 U.S. 436 (1986)	passim
McCleskey v. Zant, 499 U.S. 467 (1991)	21, 22, 24
Murray v. Carrier, 477 U.S. 478 (1986)	18, 26
Sawyer v. Whitley, 505 U.S. ___, 112 S.Ct. 2514 (1993)	passim
Sawyer v. Whitley, 945 F.2d 812 (5th Cir. 1991), *aff'd* 505 U.S. ___, 112 S.Ct. 2514 (1993)	25

Schlup v. Armontrout, 941 F.2d 631 (8th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1273 (1992) 10
Schlup v. State, 758 S.W.2d 715 (Mo. banc 1988) 7
Smith v. Armontrout, 888 F.2d 530 (8th Cir. 1989), *stay denied*, 493 U.S. 1039 (1990) 40
Smith v. Murray, 477 U.S. 527 (1986) 19
Spencer v. Murray, 18 F.3d 229 (4th Cir. 1994) 27
Spencer v. Murray, 5 F.3d 758 (4th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct 1208 (1994) 27
State v. Schlup, 724 S.W.2d 236 (Mo. banc 1987) *cert. denied*, 482 U.S. 920 (1987) 6
Teague v. Lane, 489 U.S. 288 (1989) 17
United States v. Begnuad, 848 F.2d 111 (8th Cir. 1988) 27
United States v. Herman, 614 F.2d 369 (3d Cir. 1980) 26
United States v. Krasney, 607 F.2d 840 (9th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980) 26
United States v. Maestras, 523 F.2d 316 (10th Cir. 1975) 26
United States v. Pena, 949 F.2d 751 (5th Cir. 1991) 26
United States v. Reed, 887 F.2d 1398 (11th Cir. 1989), *cert. denied*, 493 U.S. 1080 (1990) . . . 26
United States v. Richards, 5 F.3d 1369 (10th Cir. 1993) 28
United States v. Tierney, 947 F.2d 854 (8th Cir. 1991) 26, 27
United States v. Wright, 625 F.2d 1017 (1st Cir. 1980) 26
Verdin v. O'Leary, 972 F.2d 1467 (7th Cir. 1992) 27

Whitaker v. State, 451 S.W.2d 11 (Mo. 1970) 13
Wainwright v. Sykes, 433 U.S. 71 (1977) 17
Washington v. Tames, 996 F.2d 1442 (2d Cir. 1993) 27

Statutes

28 U.S.C. §2244 . . . . . 19, 21
28 U.S.C. §2254 . . . . . 8, 17
Section 552.070, RSMo 1986 13
Section 565.001, RSMo 1978 6

Rules

Fed. R. Civ. P. 60(b)(6) 10
Missouri Supreme Court Rule 27.26 6

Secondary Authority

Friendly, J., *Is Innocence Irrelevent? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970) 20

STATEMENT OF THE CASE[1]

On February 3, 1984, corrections officers released the inmates on Walks 1 through 4 of the Special Management Unit, a high-security facility at the Missouri State Penitentiary to go to lunch. Officers noticed petitioner, Robert O'Neal[2] and Rodnie Stewart[3] running against the flow of traffic from Walk 2 toward Walk 1. Stewart carried a cup containing steaming liquid. As Inmate Arthur Dade walked toward the gate to exit Walk 1, Stewart threw the steaming liquid in Dade's face. According to two eyewitnesses, petitioner then jumped Dade from behind and grabbed his arms while O'Neal stabbed Dade four times in the chest with a homemade ice-pick, killing him.

a. Investigation of the Murder

Following Dade's murder, prison investigators interviewed one hundred individuals, including the inmates in the housing unit and all inmates in the area of the murder (J.A. 137). After a lengthy investigation, prosecutors filed murder charges against petitioner, O'Neal and Stewart. Petitioner's counsel deposed thirty-eight individuals prior to trial, including every guilt witness who testified at trial who was employed by the Department of Corrections (J.A.137).

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[1]Petitioner's statement of the case is grossly argumentative, misstates facts, and commingles facts with his personal beliefs. Thus, respondent submits the following statement of the case.

[2] *See State v. O'Neal*, 718 S.W.2d 498 (Mo. banc 1986), *cert. denied*, 480 U.S. 926 (1987).

[3] *See State v. Stewart*, 714 S.W.2d 724 (Mo. App. 1986).

Trial counsel also obtained a copy of the tape or transcript of all inmate interviews conducted by prison investigators (J.A. 82; 137). All inmates interviewed either stated that they did not see the stabbing or informed the investigators that they would not state what they saw (J.A. 17). Trial counsel examined and photographed the scene of the crime. (Post-conviction Legal File --hereinafter "P.L.F." -- at 49, 53). Counsel also had available to him all reports available to the State concerning the crime scene as well as all crime scene photographs admitted into evidence (P.L.F. 49).

b. The Trial Evidence

Petitioner went to trial, after a change of venue, in the Circuit Court of St. Charles County on December 9, 1985. The jury found petitioner guilty of murder based on the following facts: Petitioner, along with his two co-defendants Robert O'Neal and Rodnie Stewart, were inmates at the Missouri State Penitentiary and assigned to the Special Management Unit, a high-security housing facility at the penitentiary (Trial Transcript--hereinafter "Tr." -- at 133, 169, 235). Housing Unit 5A, where petitioner was incarcerated, is a building containing eight "walks" (or rows) of cells on four floors (Tr. 169, 185-186, 236-237, 333). Each walk was isolated from the others and was accessible only through a barred gate (Tr. 175-176, 235-237). At mealtimes, four walks were released at a time to go to the dining room (Tr. 236).

Sergeant Roger Flowers was the Sergeant-in-Charge of Housing Unit 5A on the day of Dade's murder (Tr. 234). At approximately noon on Friday, February 3, 1984, Sergeant Flowers released inmates for the noon meal (Tr. 235-236). He first released the inmates housed on Walk 2,

which included petitioner, O'Neal and Stewart. After all the inmates stepped out of their cells, he proceeded to release the inmates housed on Walk 1 which included Dade (Tr. 238-239).

As Sergeant Flowers opened the cells on Walk 1, he noticed that Stewart was walking against the flow of inmates coming out of Walk 1 (tr. 242). As Stewart passed a few feet in front of him, Sergeant Flowers noticed that Stewart was carrying a cup containing steaming liquid (Tr. 242). As petitioner and O'Neal passed a few feet in front of Sergeant Flowers heading toward Walk 1, Stewart threw the steaming liquid in Dade's face (Tr. 242). As Dade raised his hands to his face, Sergeant Flowers saw petitioner jump on Dade's back (Tr. 242). Sergeant Flowers shouted for help, unlocked the gate and entered Walk 1 (Tr. 243). Sergeant Flowers grabbed Stewart as petitioner and O'Neal fled (Tr. 243). Stewart and Sergeant Flowers fought for approximately two minutes before Sergeant Flowers was able to subdue Stewart (Tr. 243).

After apprehending Stewart, Sergeant Flowers escorted him to base control (Tr. 245). There, Sergeant Flowers informed Captain Eberle of the disturbance and identified petitioner as one of the participants (Tr. 245). Sergeant Flowers testified that approximately five to ten minutes had elapsed from the time he first saw Stewart throw the steaming liquid in Dade's face until he met Captain Eberle near base control (Tr. 247).

Sergeant Flowers further testified at trial that the guards on the upper walks were responsible for watching the movement of inmates on the lower walks during their release for meals (Tr. 253). He stated that he in fact had been on Walk 7 in the past and that an officer on Walk 7

can see inmate movement on Walk 1 where the murder occurred (Tr. 253). Likewise, the prosecutor introduced photographs taken from Walk 7 showing the view a guard would have had of Walk 1 (Tr. 253-256).

Officer John Maylee witnessed the murder from Walk 7 where he was assigned on February 3, 1984 (Tr. 331).[4] Officer Maylee saw petitioner, Stewart and O'Neal running against the flow of traffic between Walk 1 and 2 (Tr. 332). Officer Maylee saw Stewart throw the steaming liquid in Dade's face (Tr. 332). He then saw petitioner jump on Dade's back while O'Neal stabbed Dade in the chest (Tr. 339, 342-43). He further observed O'Neal run towards the rear of Walk 1, away from the dining room, approximately thirty to thirty-five feet. He saw O'Neal throw the ice-pick he used to stab Dade through a window (Tr. 338). He did not see the direction petitioner or Stewart fled because he kept his eyes on O'Neal (Tr. 339).

Officer Dan Bowers saw O'Neal go to a utility sink on Walk 2 and wash blood off his hands (Tr. 181-182). Other evidence indicated that the window in which O'Neal had discarded the weapon had been broken and blood was found on the window sill (Tr. 188, 210). Officials later determined that O'Neal had a large laceration on the back of his right hand (Tr. 299, 364).

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[4]Maylee's deposition was read to the jury after the prosecutor stated that Maylee was unavailable. Although trial counsel stipulated that the letter shown to him by the prosecutor would establish unavailability, trial counsel requested that the court rule on the unavailability issue. The court then made a finding that Maylee was unavailable. (Tr. 330).

Lieutenant Robert Faherty, who did not witness the murder, noticed that the T-3 door -- which was between the housing unit and the dining room -- was not manned (Tr. 315). He waited at the door for approximately 10 to 15 seconds until the guard who was assigned to the post arrived (Tr. 303, 307). Faherty arrived at the door before any of the inmates entered the corridor which led from the housing unit to the T-3 door (Tr. 316). After arriving, Faherty saw petitioner coming down the corridor (Tr. 316). He admonished petitioner for shouting out a window unaware at the time that the murder had occurred (Tr. 306). Petitioner proceeded past Faherty in the direction of the dining room (Tr. 306). The window from which petitioner yelled was one floor below the scene of the stabbing and close to where O'Neal had discarded the weapon (Tr. 306).

In addition to the testimony of Flowers and Maylee, the State also produced a videotape showing petitioner entering the dining room and officers responding to the call for help one minute and five seconds after petitioner entered the dining room. Testimony was also produced that the amount of time it took to get from the scene of the murder to the dining room was anywhere from thirty-three seconds to one minute and thirty-seven seconds depending if one walked or ran the distance (Tr. 465-466). Captain Eberle stated that he radioed for help five to ten minutes after first being informed that a disturbance had occurred (Tr. 209, 212, 247).

Petitioner presented the testimony of two inmates, Bernard Bailey and Arthur St. Peter, in support of his defense that he was not in the area of the stabbing (Tr. 443, 452). These inmates claimed that they were walking behind petitioner as he proceeded to the dining room and that petitioner could not have been involved in Dade's violent

death (Tr. 445, 456). After hearing all the evidence, the jury found petitioner guilty of capital murder pursuant to §565.001, RSMo 1978 (repealed 1984) (Tr. 519). At the punishment phase of the trial, the State presented evidence that petitioner had forcibly sodomized a cell mate in the Pettis County Jail (Tr. 547-549) and assaulted a cell mate in the Missouri State Penitentiary (Tr. 566).[5] After hearing the evidence at the penalty phase, the jury recommended a sentence of death (Tr. 660).

c. State Post Trial Proceedings

Petitioner appealed his conviction to the Supreme Court of Missouri, which affirmed the conviction on February 17, 1987, and this Court denied review on June 8, 1987. *State v. Schlup*, 724 S.W.2d 236 (Mo. Banc 1987), *cert. denied*, 482 U.S. 920 (1987). Petitioner filed a post-conviction relief motion under Missouri Supreme Court Rule 27.26 (repealed Jan. 1, 1988) with the Circuit Court of St. Charles County on July 13, 1987. Petitioner's motion alleged, in pertinent part, that his attorneys were ineffective for failing to investigate petitioner's alibi defense and failing to interview Robert O'Neal, Van Robinson, Lamont Griffin and Ricky McCoy (P.L.F. 5); failing to investigate the crime scene to establish the amount of time necessary to travel from the scene of the murder to the dining room (P.L.F. 5); failing to investigate Randy Jordan "who petitioner believes was in fact the third participant" (P.L.F. 6); and that the State failed to disclose exculpatory evidence

[5] The statutory aggravating circumstances found by the jury to make petitioner eligible for capital punishment were petitioner's substantial history of assaultive convictions and that petitioner was in lawful custody of a place of confinement when he committed the murder. *See* §565.012, RSMo 1978 (repealed 1984).

that someone other than petitioner committed the murder (P.L.F. 8). After appointment of counsel and an evidentiary hearing, the circuit court denied petitioner's motion. The circuit court found the following facts:

> 1) Trial counsel fully investigated and presented the alibi defense (P.L.F. 48);
>
> 2) Inmates Van Robinson, Lamont Griffin and Ricky McCoy were not mentioned to trial counsel by petitioner as potential alibi witnesses (P.L.F. 48-50, 52);
>
> 3) Inmates Griffin and McCoy were interviewed by investigators and the reports were provided to defense counsel. Both claimed no knowledge of the murder (P.L.F. 49-50, 52);
>
> 4) Trial counsel did not interview inmate Randy Jordan because petitioner, while maintaining someone else committed the acts attributed to him, refused to give the name of that person to trial counsel (P.L.F. 50-51, 53, 55);
>
> 5) All rumors of involvement in the crime by other persons were investigated by prison authorities and were found to be without foundation (P.L.F. 52, 55);

The Supreme Court of Missouri affirmed the circuit court's ruling, *Schlup v. State*, 758 S.W.2d 715 (Mo. banc 1988), holding as follows:

The motion court found that appellant's rights "were not violated by failure of the State to disclose evidence which would tend to negate his guilt as there was no such evidence to disclose... . A full investigation on the part of correction officials failed to produce any shred of evidence corroborating the rumors and allegations of any other person's involvement." Furthermore, appellant's trial counsel testified that appellant knew who the alleged third attacker was, and the motion court concluded that "Petitioner failed to give the name of the alleged third attacker in the underlying murder to his counsel... . The State cannot be faulted for failing to disclose uncorroborated information apparently known to the Petitioner."

Id. at 717.

d. Federal Habeas Corpus Proceedings

Petitioner filed his first petition for writ of habeas corpus under 28 U.S.C. §2254 in the United States District Court for the Eastern District of Missouri on January 5, 1989. After the appointment of counsel, an amended petition was filed raising, in pertinent part, that (1) trial counsel was ineffective for: failing to investigate his alibi defense, failing to interview witnesses, failing to visit the murder scene and; (2) the State failed to disclose exculpatory evidence. Out of the twenty-six grounds for relief none alleged that petitioner was innocent of the murder. In an Order denying part of petitioner's claims as procedurally defaulted, the District Court found that the

"record does not support any contention that petitioner is 'actually innocent' of the murder charge" (Order at 4 n 1). The District Court denied petitioner's remaining claims on November 21, 1989, finding that petitioner's elaims of ineffective assistance of counsel and claims that the State failed to disclose exculpatory evidence were without merit. Petitioner appealed the District Court's denial to the United States Court of Appeals for the Eighth Circuit, alleging that counsel was ineffective and that the District Court erred in declining to conduct an evidentiary hearing. On July 22, 1991, the Court of Appeals affirmed the District Court's denial, reviewing petitioner's ineffective assistance of counsel claims on the merits. The Court of Appeals held:

> We find that trial counsel's performance was not ineffective under the two-step test of *Strickland*. First, trial counsel was not ineffective under the performance component of *Strickland* in not investigating and calling additional alibi witnesses at the guilt phase of Schlup's trial. Schlup's [principal] argument during trial was that he was innocent of the murder, and he sought to establish that he was not present at the time and place of the offense. Trial counsel called three alibi witnesses, Oscar Dunbar, Bernard Bailey and Arthur St. Peter. Schlup did not advise trial counsel that additional persons, Robert O'Neal, Van Robinson, Lamont Griffin and Ricky McCoy, could also serve as alibi witnesses, and trial counsel did not interview or call any other person as an alibi witness. However, during his preparation for trial, counsel reviewed the testimony given by O'Neal at two

> previous trials of Schlup's co-defendants, and he reviewed statements of Griffin and McCoy which were given to investigators after the murder. Based on his review, trial counsel concluded that O'Neal's testimony could be damaging, and that any other testimony would be repetitive of the testimony to be presented at trial. Counsel was not ineffective in failing to interview and call witnesses whose testimony would be repetitive or potentially damaging, especially when Schlup failed to inform counsel of the possibilities of these witnesses with regard to an alibi defense.

See Schlup v. Armontrout, 941 F.2d 631 (8th Cir 1991), *cert. denied*, ___, U.S. ___, 112 S.Ct. 1273 (1992).

After review by this Court was denied, petitioner filed a motion for relief from judgment under Fed. R. Civ. P. 60(b)(6). The District Court denied petitioner's motion and petitioner declined to appeal (J.A. 69).

Petitioner filed a second petition[6] for writ of habeas corpus with the District Court alleging newly discovered evidence of actual innocence, that the State had failed to disclose exculpatory information involving interviews with inmate witnesses, and ineffective assistance of counsel (J.A.

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[6] This was technically petitioner's third petition for writ of habeas corpus, *See Blair v. Armontrout*, 976 F.2d 1130, 1134 (8th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2357 (1993) (treating a Rule 60(b) motion as a second petition for writ of habeas corpus); *Bolder v. Armontrout*, 983 F.2d 98, 99 (8th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1070 (1993) (same).

69-70).[7] The petition contained numerous affidavits from inmates who, although they originally told investigators they had not seen the murder or would not state what they saw, now allege that they witnessed the murder and claim that petitioner was not involved.[8] Petitioner also claims that the videotape shown at trial, along with the newly created affidavits, prove conclusively that he could not have been involved in the stabbing (Brief at 10). The District Court denied petitioner's successive and abusive petition (J.A. 70, 87) finding that he had failed to establish: (1) cause for failing to file successive claims in the first habeas litigation (J.A. 71-75), (2) a showing of actual innocence entitling him to review of his underlying constitutional claims (J.A. 79, 81, 84, 86-87), (3) merit to the underlying constitutional claims (J.A. 76-79, 82-83), and (4) justification for reconsideration of successive claims (J.A. 86).

Petitioner appealed the District Court's denial of his second habeas petition contending that the District Court erred in finding that he had failed to establish actual

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[7] Inexplicably, petitioner claims that the "fifteen witnesses" listed in his second petition for writ of habeas corpus were "unknown" to trial counsel (Pet. Brief at 15). Eleven of these fifteen inmates were interviewed prior to petitioner's trial and their statements provided to petitioner's counsel.

[8] Petitioner's petition was presented to the lower federal courts in a piecemeal fashion. Petitioner presented some of these affidavits with his petition (J.A. 8 citing Appendix A), in a Supplemental Motion to Expand the Record (J.A. 62), an additional affidavit with his Supplemental Rule 59(e) motion (J.A. 121-25), and more affidavits with his brief on appeal (J.A. 138-39). Petitioner has also informed this court that he intends to present even more affidavits in a Rule 60(b) motion that he intends to file with the District Court after completion of these proceedings. (Brief at 19 n. 24).

innocence in order to raise his claims in the present petition. In affirming the District Court's judgment, the Court of Appeals held that petitioner had asserted "a number of constitutional claims" not raised, or raised and denied in his first petition (J.A. 132). The Court of Appeals found that petitioner's ineffective assistance of counsel claims were addressed on the merits during appeal from the denial of his first petition for writ of habeas corpus despite the fact that these claims were procedurally defaulted in the state courts (J.A. 136). The Court of Appeals also held that counsel was not ineffective during either the guilt or penalty stages "even if we consider the evidence now present[ed]." (J.A. 136). [9]

The Court of Appeals stated that it was trial counsel's very persistence that confirmed the existence of the dining room videotape now used by petitioner (J.A. 137). Trial counsel determined through discovery that one hundred persons were interviewed by prison investigators and "appears to have obtained, for review, the tapes or transcripts of all the statements resulting from these inquires" (J.A. 137). The Court of Appeals noted that the problem was not trial counsel's deficiencies, but rather the changing nature of the information presented by petitioner's potential and actual witnesses who claimed to have been present at or near Dade's murder (J.A. 137).

Petitioner also attempted to discredit the two eyewitnesses who positively identified him. (J.A. 137). The Court of Appeals rejected that attempt on the ground that

[9]The Court of Appeals noted that petitioner's counsel not only "spearheaded" the discovery and defense preparation, but that he had arranged and participated in the taking of thirty-eight depositions including every guilt witness who testified for the State. (J.A. 137).

credibility of eyewitness testimony was for the jury to decide (J.A. 137). The Court of Appeals further rejected petitioner's actual innocence claim based on purported newly discovered evidence, ruling that petitioner "falls" well short of showing by "clear and convincing evidence [that] no reasonable juror would find him [guilty of murder]". quoting *Sawyer v. Whitley*, 505 U.S. ___, 112 S.Ct. at 2514 (1993) (J.A. 138-143).

e. Clemency Proceedings

Currently pending before the Governor of the State of Missouri is petitioner's request for executive clemency (J.A. 3). The Governor, pursuant to §552.070, RSMo 1986, referred the request to a Board of Inquiry, which has taken briefs and evidence on petitioner's claim of newly discovered evidence of actual innocence. *See also Whitaker v. State*, 451 S.W.2d 11, 18 (Mo. 1970) (newly discovered evidence concerning innocence is cognizable in a clemency proceeding).

SUMMARY OF THE ARGUMENT

Petitioner's belated claim of actual innocence attempts to invoke a narrow exception to the rule precluding federal court review of defaulted, successive and abusive claims. Federal court review of a state court conviction seriously intrudes upon state sovereignty and entails significant costs. The intrusion and costs are greatly magnified where, as here, a second petition for writ of habeas corpus is involved.

For these reasons, this Court has repeatedly emphasized that defaulted, abusive and successive claims may be reviewed *only* if cause and actual prejudice is shown, or if petitioner can show that he is actually innocent.[10] Petitioner does not now argue that cause and actual prejudice was shown; rather, petitioner contends that he has shown actual innocence under the standard set forth in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (plurality opinion).

Claims of actual innocence, because they are directly contrary to a jury's determination of guilt, are inherently suspect. Because they invite a second (or even third or fourth) tribunal to, in effect, give the defendant a second trial on the merits, they also undermine society's interest in finality. In *Harris v. Reed*, 489 U.S. 255 (1989), Justice O'Connor described actual innocence as "'a kind of safety valve' which should be reserved for the 'extraordinary case' where a substantial claim of factual innocence is precluded by inability to show cause." *Id.* at 271 (O'Connor, J., concurring). Petitioner's evidence does not come close to presenting the "extraordinary case" that Justice O'Connor envisioned. Rather, petitioner repackages and attempts to relitigate evidence presented at trial or evidence known to petitioner before trial.

In *Sawyer v. Whitley*, 505 U.S.___, 112 S.Ct. 2514 (1993), this Court applied the narrow actual innocence

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[10] As this Court ruled last term, the issue of miscarriage of justice, which is typically referred to as actual innocence, is not in and of itself a ground for relief but rather a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins*, 506 U.S.___, 113 S.Ct. 853, 862 (1993).

exception to a death penalty challenge, requiring a prisoner to "show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Id.* 112 S.Ct. at 2517.

Petitioner now contends that *Sawyer* should be limited to claims of actual innocence during the penalty phase. As to guilt phase actual innocence, he would resurrect the standard used by the plurality in *Kuhlmann*, requiring a prisoner to show "a fair probability" that in light of all the evidence, a trier of fact "would have entertained a reasonable doubt of his guilt". *Kuhlmann v. Wilson*, 477 U.S. at 454.

As the Appellate Court correctly held, *Sawyer* should be applied to both guilt and penalty phase issues. It allows for a sufficient review of fundamental miscarriage of justice claims, consistent with the underlying principle that such claims are "a narrow" exception reserved for "extraordinary" cases. Moreover, applying *Sawyer* to guilt phase issues promotes uniformity and prevents diverse results in cases where a miscarriage of justice is alleged on both guilt and penalty phase issues.

Finally, even if this Court were to decline to apply *Sawyer* to guilt phase issues, petitioner would not be entitled to relief. Petitioner has not made a sufficient showing under *Kuhlmann* to pass through the "gateway" and have his defaulted, abusive and successive claims considered on the merits. Assuming he had, the District Court properly held that petitioner's underlying constitutional error claims were without merit in any event. For all these reasons, the sound decision of the Eighth Circuit Court of Appeals should be affirmed.

ARGUMENT

I.

THE COURT OF APPEALS PROPERLY REVIEWED PETITIONER'S CLAIM OF FUNDAMENTAL MISCARRIAGE OF JUSTICE UNDER THE STANDARD SET FORTH IN *SAWYER V. WHITLEY.*

Petitioner's first question for review is whether the standard of *Sawyer v. Whitley*, 505 U.S. ___, 112 S.Ct. 2514 (1992) or *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (plurality opinion) defines the miscarriage of justice exception for review of defaulted, abusive or successive claims for guilt phase issues. *Sawyer* contains the appropriate test. According to *Sawyer*'s express language, it was meant to "amplify the meaning of 'actual innocence' in the setting of capital punishment". *Sawyer v. Whitley*, 112 S.Ct. at 2519. Its rationale applies with equal, if not greater, force to guilt phase issues than the penalty phase issues presented there. As discussed below, it simply makes no logical sense to utilize two different standards in capital cases--one for the guilt phase and one for the penalty phase. *Sawyer* should be applied here.

a. The History of the Fundamental Miscarriage of Justice Exception

For some thirty years, this Court has struggled with the widespread misuse of the Great Writ, and has sought to protect fundamental principles of federalism, comity and finality which are imperiled by such misuse. Where, as in the case at bar, multiple and dilatory habeas corpus petitions are filed which raise claims never fairly presented

to the state court, this Court has concluded that the above interests require the federal court to decline to review federal constitutional claims regardless of whether they have merit. Review of caselaw will demonstrate this Court's proper emphasis on the principles of federalism and finality in balancing the needs of the criminal justice system with the limited role of federal habeas corpus under 28 U.S.C. § 2254 (1988). *See Teague v. Lane*, 489 U.S. 288, 306-307 (1989) (discussing limited role of habeas corpus as deterrent to state court misconduct in considering constitutional claims).

In *Fay v. Noia*, 372 U.S. 391 (1963), this Court was faced with a claim which had not been presented to any state court. The Court adopted a test allowing the federal courts to deny relief if a prisoner's failure to raise the claim was a deliberate bypass of the orderly procedures of the state courts. *Id.* at 438. Fourteen years later, in *Wainwright v. Sykes*, 433 U.S. 71 (1977), this Court declined to review a defaulted guilt phase issue. The court reasoned that the *Fay* test encouraged "sandbagging" on the part of defense counsel. *Id.*

The *Wainwright* court chose to apply the cause and actual prejudice test announced in *Francis v. Henderson*, 425 U.S. 536 (1976). In doing so, the court said that failure to require compliance with a state's contemporaneous-objection rule would detract from the perception that the trial is a "decisive and portentous event." *Wainwright v. Sykes*, 433 U.S. at 90. Principles of comity require federal courts to respect a state's procedural rule. *Id.* at 88. The rule also promoted finality by allowing early resolution of the constitutional claim when memories are freshest. *Id.* at 88-89. The trial should be the "main event" not a tryout for later habeas review. *Id.* at 90. Although the

cause and prejudice requirement would limit review of procedurally defaulted claims, it would "not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." *Id.* at 91.

In *Engle v. Isaac*, 456 U.S. 107 (1982), this Court Recognized the toll the Great Writ had in undermining the usual principles of finality of litigation, *id.* at 126-27, in degrading the prominence of the trial and its legal and constitutional protections, *id.* at 127, in frustrating society's right to punish, *id.* at 127-28, and in frustrating the state's attempts to honor constitutional rights, *id.* at 128; thus, the court declined to adopt the habeas applicant's request that the federal court engage in "the more vague inquiry suggested by the words 'plain error'". *Id.* at 135.

In *Murray v. Carrier*, 477 U.S. 478 (1986), the court further described the miscarriage of justice exception as follows:

> Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.

Id. at 496. However, the court did not explain the showing necessary to fulfill this extraordinary exception.

Although the above cases discuss the issue of defaulted guilt phase claims, this Court has also addressed

the cause and actual prejudice standard to a defaulted penalty phase issue. *Smith v. Murray*, 477 U.S. 527 (1986). The Court also announced that while the concept of actual, as distinct from legal, innocence does not translate easily into alleged errors during the penalty phase, the fundamental miscarriage of justice exception applied as a gateway to federal court review of defaulted penalty phase claims. *Id.* at 537-538.

In *Kuhlmann* a plurality of the court declined to review a successive claim without a showing by the prisoner that the ends of justice would be served by reaching the merits of the successive petition. *Kuhlmann v. Wilson*, 477 U.S. at 444-45. The court agreed that the Court of Appeals opinion demonstrated a need for the court to provide guidance as to the "ends of justice" requirement. *Id.* at 445

While acknowledging that 28 U.S.C. §2244(b) (1988) no longer made reference to the "ends of justice" provision of the previous statute, 28 U.S.C. §2244 (1964), the court was cognizant that Congress adopted the 1966 version of §2244 to weigh the interests of the individual prisoner against those of the State. *Id.* at 449. In weighing those interests, the court held that the interest of a prisoner in litigating claims held meritless in earlier habeas litigation did not extend to cases where the prisoner's guilt is conceded or plain. *Id.* at 452. Likewise, the court cautioned that the "ends of justice" exception should be narrow because finality of litigation serves an important State interest noting that release on a successive petition usually occurs years after the crime and when the State's ability to retry the prisoner is frustrated. *Id.* at 453 n. 15.

In determining that the "ends of justice" requirement is met when a prisoner "supplements his constitutional claim with a colorable showing of factual innocence," *id.* at 454, the court adopted the standard from Judge Friendly's article: *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 148-149 (1970). *Id.*[11] A prisoner may make this showing "by establishing that under the probative evidence he has a colorable claim of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. at 454. A prisoner attempting to demonstrate his innocence must make this showing despite a claim that the evidence of guilt may have been unlawfully admitted. *Id.* The court noted that "a prisoner does not make a colorable showing of innocence 'by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained'". *Id.* at 454 n. 17. "Thus, the question whether the prisoner can make the requisite showing must be determined by reference to *all* probative evidence of guilt or innocence. *Id.* (emphasis in original). Judge Friendly defined "all the evidence" as including not only the evidence a prisoner now presents, but also the evidence that was admitted at trial.[12] According to *Kuhlmann*, the

[11]Judge Friendly's article recommended limiting the availability of habeas corpus in situations where there is *de novo* review. This standard would apply to *all* habeas petitions, not merely to abusive, defaulted or successive ones. Whatever merit this proposition has, it need not be decided in this case since the petitioner's claims are both defaulted and abusive for which a higher standard should be applied.

[12]Although Judge Friendly discussed the reliability of illegally admitted evidence, Friendly, *supra* at 160, he did not go as far as petitioner claims and allow a re-determination of the credibility of lawfully adduced evidence. (Pet. Brief at 24).

prisoner may have his successive claim considered when he supplements his claim with new retroactive law or with a factual ground not determined in the first litigation, 28 U.S.C. §2244(b)(1988), and the prisoner supplements that with a "colorable showing of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. 454.

In *McClesky v. Zant*, 499 U.S. 467 (1991), this Court reviewed a second federal habeas petition that raised a guilt phase claim for the first time in federal court. The court determined that the constitutional claim did not demonstrate that the prisoner was probably actually innocent. In order to ensure that the exception remained narrow, the court stressed that probable actual innocence meant that the prisoner did not commit the crime. *Id.* at 502.

Throughout these cases, this Court has continually stressed that the colorable showing of innocence must be made with all probative evidence relating to guilt.

Although *Kuhlmann* discussed the actual innocence of guilt in connection with the "ends of justice" exception to the prohibition to review of successive claims, the Court of Appeals noted that "the contours of this qualification were more clearly delineated" in *Sawyer* (J.A. 134). Keeping in mind that "probable actual innocence" is not in and of itself a ground for relief, but rather "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits," *Herrera v. Collins*, 506 U.S.___, 113 S.Ct. 853, 862 (1993), *Sawyer* properly articulates the probable actual innocence standard this Court has defined as a narrow exception to the prohibition to review of defaulted, successive and/or abusive claims.

b. Policy Reasons For Continuing To Apply *Sawyer* to Guilt Phase Claims

In declining to adopt the standard of actual innocence proposed by the inmate in *Sawyer*, this Court noted that the standard proposed would so broaden the inquiry as to make it anything but a narrow exception to the principle of finality. *Sawyer v. Whitley,* 112 S.Ct. at 2522. Because the fundamental miscarriage of justice is a "narrow" exception reserved for "extraordinary" cases, *id.* at 2519 *citing Dugger v. Adams*, 489 U.S. 401, 412 n. 6 (1989); *McClesky v. Zant*, 499 U.S. at 467, the prisoner should be required to sustain a heavy burden to establish it. *Id.* A challenge to the credibility of State witnesses many years after the trial, which petitioner makes here, destroys the principle of finality that this Court has long sought to enforce.

This Court in *Sawyer* expressly recognized that "[t]his sort of latter-day evidence brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing" of actual innocence. *Sawyer v. Whitley*, 112 S.Ct. at 2524. Thus, preventing, or least minimizing, this type of "latter-day evidence" in habeas cases was precisely what the *Sawyer* standard was designed to accomplish. It is directly inconsistent with *Sawyer*'s rationale to claim, as petitioner in effect does, that this type of latter-day evidence is somehow more appropriate in habeas cases involving guilt phase issues than those involving penalty phase issues. It is not appropriate in either case, as *Sawyer* correctly indicates. In rejecting the proposition that actual innocence should be extended not only to elements of the crime but also to the existence of aggravating factors and mitigating evidence the *Sawyer* Court held that:

> A federal district judge confronted with a claim of actual innocence may with relative ease determine whether a submission for example, that a killing was not intentional, consists of credible, noncumulative and admissible evidence negating the element of intent.

112 S.Ct. at 2522.

Petitioner requests this court to interpret *Kuhlmann* in a way that would permit federal habeas courts not only to weigh the new evidence, but also to reweigh the evidence presented at trial simply because the constitutional claim to be reviewed was successive, abusive or defaulted. The weighing of evidence presented at trial has been traditionally left to the fact finder. To reweigh evidence presented at trial goes even one step further. This Court must insulate the function of the jury to believe or disbelieve witnesses from judicial scrutiny by federal courts years and perhaps decades after the trial. Of course, all the evidence must be considered by the reviewing court in determining whether the habeas applicant negates, by clear and convincing evidence, an essential element of the offense. *Sawyer v. Whitley*, 112 S.Ct. at 2524.

Actual innocence is a narrow exception allowing review of defaulted, abusive and successive claims. It operates best if subject to "objective standards". *Sawyer v. Whitley,* 112 S.Ct. at 2520. If a prisoner is not required to show more than mere prejudice, the denial of the first federal habeas petition would be meaningless. *Id.* at 2522 & n 13. This Court rejected a "fair probability" standard in *Sawyer*, a standard that would allow the reweighing of all evidence. *Id.* at 2521.

The court should have one standard for determining whether a prisoner is "probably actually innocent" for the purpose of allowing federal court review of defaulted, abusive and successive guilt and penalty phase claims. Petitioner, on the other hand, proposes two standards, *Kuhlmann* for guilt phase claims and *Sawyer* for penalty phase claims. The Court should reject petitioner's paradigm.

First, this Court stated in *McCleskey* its preference for a single standard for reviewing abusive, successive and defaulted claims. 499 U.S. 493-96. The Court extended the cause-prejudice-actual innocence exception to evidentiary defaults in *Keeney v. Tamayo-Reyes*, ___ U.S.___, 112 S.Ct. 1715 (1992). One of the rationales was to advance uniformity in habeas corpus law. *Id.* Application of a uniform test has long been a concern of this Court. *See Keeney v. Tamayo-Reyes,* 112 S.Ct. at 720. Advancement of a uniform test promotes certainty. Application of different standards for guilt and penalty phase claims promotes inconsistent results and results in injustice. This Court has recognized that there are similarities between a trial on guilt and a capital punishment sentencing proceedings. *Bullington v. Missouri*, 451 U.S. 430 (1981). Therefore, the application of the same test for determining actual innocence should be applied.

Second, petitioner's dichotomy assumes the existence of two separate standards, one from *Kuhlmann* and one from *Sawyer*. The Court of Appeals was unwilling to assume the existence of separate standards. (J.A. 134). *See also Johnson v. Hargett,* 978 F.2d 855 (5th Cir. 1992). The *Sawyer* Court was well aware of *Kuhlmann, e.g. Sawyer v. Whitley*, 112 S.Ct. at 2518, 2519 & n. 5, as it

described the "probable actual innocence" exception. *Id.* at 2518.

Third, the Court should not have a lower standard for guilt phase claims, otherwise, penalty phase claims litigated in a first habeas litigation will reappear in second habeas litigation as guilt phase claims. An example illustrates: If petitioner alleged ineffective assistance of counsel because he did not present a lingering doubt defense or a psychological defense at the penalty phase, and habeas relief was denied, habeas court one would have issued an opinion detailing the defects of the claim. The prisoner in the second habeas litigation, under a (perceived) lower *Kuhlmann* standard, will attempt to revive the claims and relitigate them as guilt phase claims. If the claims cannot be relitigated under *Sawyer* as to the penalty phase, they should not be relitigated as guilt phase claims.

The Fifth Circuit standard adopted by this Court in *Sawyer v. Whitley*, 112 S.Ct. at 2517, was no more than a translation of *Kuhlmann* to guilt and penalty phase issues. The Fifth Circuit's rationale for this standard was that a prisoner must show a fair probability that a rational trier of fact would have entertained a reasonable doubt to the existence of those facts which are a prerequisite to impose the death penalty. *Sawyer v. Whitley*, 945 F.2d 812, 821 (5th Cir. 1991), *aff'd*, 505 U.S. ___, 112 S.Ct. 2514 (1993).

To give the term "fair probability" a broader meaning would violate the province of the fact finder to believe or disbelieve the issues presented at trial and substitute for the fact finder's judgment that of the court who has heard the claims of innocence years after the trial. Because the function of a trial is the search for truth, to interpret "fair probability" as something less than the clear

and convincing standard would result in the application of a subjective standard of review contrary to this Court's intent. *Sawyer v. Whitley*, 112 S.Ct. at 2520. To apply a standard allowing relief by a mere showing that the trier of fact "would have entertained a reasonable doubt" as to guilt undercuts the objective standard this Court sought to implement in reviewing claims of actual innocence. A claim of actual innocence must do more than "call into question the reliability of an adjudication of legal guilt." *Murray v. Carrier*, 477 U.S. at 495.

This Court noted in *Sawyer* that "in the context of a noncapital case, the concept of 'actual innocence' is easy to grasp." *Sawyer v. Whitley*, 112 S.Ct. at 2520. While such claims are regularly made on motions for new trial, these are routinely denied because they failed to meet the rigorous standard for granting of such motions. *Id* at 2519. For instance, many federal courts have adopted a five part test in order for a federal defendant to obtain a new trial based on newly discovered evidence. *See, e.g. United States. v. Wright* , 625 F.2d 1017 (1st Cir. 1980); *United States v. Herman*, 614 F.2d 369 (3d Cir. 1980); *United States v. Pena*, 949 F.2d 751 (5th Cir. 1991); *United States v. Tierney*, 947 F.2d 854 (8th Cir. 1991); *United States v. Krasney*, 607 F.2d 840 (9th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980); *United States v. Maestas*, 523 F.2d 316 (10th Cir. 1975); *United States v. Reed*, 887 F.2d 1398 (11th Cir. 1989), *cert. denied*, 493 U.S. 1080 (1990). This showing requires that:

> (1) the evidence in fact is newly discovered, (2) the movant has shown due diligence, (3) the new evidence is not "merely cumulative or impeaching," (4) the new evidence is material to relevant issues, and (5) on retrial, "the newly discovered evidence would probably produce an acquittal."

United States v. Tierney, 947 F.2d at 862, *quoting United States v. Begnaud*, 848 F.2d 111, 113 (8th Cir. 1988).

The fair probability standard enunciated in *Kuhlmann* was amplified in *Sawyer*. To hold otherwise would allow a lower standard of review for claims of new evidence raised years after the state trial than it would for claims of new evidence presented in a motion for new trial in a federal criminal case. This Court must insulate the discretionary function of the jury to believe or disbelieve witnesses from judicial scrutiny.

Likewise, lower courts have applied the *Sawyer* standard to review claims of actual innocence relating to guilt recognizing that *Sawyer* simply clarified *Kuhlmann*. *See Washington v. Tames*, 996 F.2d 1442, 1447 (2d Cir. 1993) (applying *Sawyer* to guilt phase default); *Hull v. Freeman*, 991 F.2d 86, 91 n. 3 (3d Cir. 1993) (applying *Sawyer* to guilt phase claims in dicta); *Spencer v. Murray*, 5 F.3d 758, 766-67 (4th Cir. 1993), *cert. denied* , ___ U.S. ___, 114 S.Ct. 1208 (1994) (applying *Sawyer* to discovery claim); *Spencer v. Murray*, 18 F.3d 229, 236 (4th Cir. 1994) (holding that *Sawyer* is not limited to penalty phase errors); *Kirkpatrick v. Whitley*, 992 F.2d 491, 495 (5th Cir 1993) (remanding cause to district court to apply *Sawyer* standard to guilt phase issues); *Verdin v. O'Leary*, 972 F.2d 1467, 1483 (7th Cir. 1992) (remanding cause to district

court to apply *Sawyer* standard to guilt phase issues); *Clark v. Lewis*, 1 F.3d 814, 824-25 (9th Cir. 1993) (applying *Sawyer* to guilt phase issues); *United States v. Richards*, 5 F.3d 1369, 1371 (10th Cir. 1993) (applying *Sawyer* to §2255 guilt phase issues); *Ballinger v. Kerby*, 3 F.3d 1371, 1375 (10th Cir. 1993) (applying *Sawyer* to *Brady* claim impeaching the witnesses in guilt phase issue).

II.

THE COURT OF APPEALS PROPERLY APPLIED THE *SAWYER v. WHITLEY* STANDARD TO PETITIONER'S CLAIM OF FUNDAMENTAL MISCARRIAGE OF JUSTICE.

Petitioner's second question presented for review is if *Sawyer v. Whitley*, 505 U.S. ___, 112 S.Ct. 2514 (1992) applies to guilt phase issues, does it require petitioner to show that the evidence of guilt was constitutionally insufficient to support the conviction under *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (Pet. Brief 35).

Petitioner admits that the Court of Appeals did not "explicitly state that it was equating the *Sawyer* standard with *Jackson's*," but rather petitioner argues that the logic of the Court of Appeals decision "makes clear that it did so" (Pet. Brief at 35).

Because the Court of Appeals did not cite to or rely on *Jackson* in determining that petitioner failed to meet the standard for review of his claims, the issue of whether *Jackson* should apply is not ripe for review. *See Herrera v. Collins*, 506 U.S. ___, 113 S.Ct. 853, 871 (1993) (O'Connor, J., concurring). Simply because petitioner equates the Court of Appeals opinion as applying *Jackson* to fundamental miscarriage of justice claims involving guilt phase issues does not demonstrate that the Court of Appeals did so. Petitioner merely speculates that the Court of Appeals implicitly applied *Jackson* in his case. This speculation does not warrant review of this question.

Furthermore, respondent does not contend that *Sawyer* requires a habeas petitioner to show that the

evidence of guilt was constitutionally insufficient to support a conviction. Rather, as previously discussed, *Sawyer* clearly places on the habeas petitioner the burden of presenting credible, noncumulative and admissible evidence that negates an essential element of the offense. This is significantly different then reviewing the evidence presented at trial as allowed by *Jackson*, because *Jackson* only reviews recorded evidence. Since *Jackson* does not allow review of unrecorded evidence, *Jackson* does not apply to claims of newly discovered evidence of actual innocence.

III.

PETITIONER CANNOT SHOW BY ANY STANDARD THAT HE MEETS THE FUNDAMENTAL MISCARRIAGE OF JUSTICE EXCEPTION.

Although petitioner contends that the evidence that he is innocent of this crime is "more than extraordinary" and "approaches a conclusive demonstration" (Pet. Brief at 42), petitioner's newly developed evidence is of the type juries hear and reject everyday in this nation's trial courts. In fact, petitioner advanced this theory of actual innocence at his trial. Furthermore, petitioner now presents two mutually exclusive theories for his actual innocence. Thus, petitioner cannot show by any standard that he meets the narrow fundamental miscarriage of justice exception. In order to believe that petitioner's evidence conclusively shows he is actually innocent, one must: (1) disbelieve the State's two eyewitnesses; (2) believe petitioner's witnesses even though they have changed their versions of what they originally observed; and (3) ignore evidence that petitioner could have participated in the murder and still have gone to the dining room at the time depicted on the State's videotape.

Petitioner's newly developed evidence does not establish that petitioner was far from the scene of the crime. Nor does petitioner's evidence negate an element of the offense. Did petitioner participate in the offense and still have sufficient time to be first in line for lunch? The evidence at trial clearly demonstrated beyond a reasonable doubt that petitioner had sufficient time to participate in the murder and easily make it to the dining room to be the first

in line for lunch.[13] Not only did two eyewitnesses identify petitioner as a participant in the murder (Tr. 234-260, 331), [14] but investigators also testified as to the amount of time it took to get from the scene of the murder to the dining room located only a couple of hundred yards away (Tr. 363-398). Guards also testified to the amount of time that passed before the murder was called into base control over the radio (Tr. 205-213).

a. The State's Videotape Supports Petitioner's Guilt, Not His Innocence.

Petitioner claims that in order to discount the videotape, one must assume that petitioner was able to rush to the head of the lunch line, past at least one guard, without being noticed. However, petitioner does not account for the fact that O'Neal was able to slip past the guards responding to the murder from the dining room

[13]Petitioner contends that his conviction was due to the prosecutor's ability to convince the jury to accept the greatest time estimates as to the amount of time it took for Sergeant Flowers to apprehend Stewart and the amount of time before the murder was radioed in (Pet. Brief at 43). This argument, in effect, admits that the issue was a question of fact for the jury. The videotape does not demonstrate actual innocence. This is not a case in which a videotape, such as a bank robbery, conclusively shows who committed the offense.

[14]Although petitioner refers to articles that question identification testimony, petitioner appears to forget that both Maylee and Flowers knew petitioner for years prior to the murder. Sergeant Flowers stated that he had known petitioner, O'Neal, Stewart and Dade for approximately two to three years before the murder occurred (Tr. 235). This is not the typical identification testimony from a victim robbed on the street, but rather this crime occurred in a controlled setting and the identification is akin to that of a family dispute gone awry.

unnoticed even though his hand was bleeding profusely.

Petitioner also claims that one would have to assume that none of the inmates would have told investigators that petitioner ran past them toward the dining room. Petitioner ignores the fact that his affiants waited some eight years to claim they witnessed the murder.

Petitioner further alleges that in order to discount the videotape, one would have to assume that petitioner was able to proceed through the T-3 door, were he was subjected to a search, without showing signs of perspiration, shortness of breath, or other incriminating evidence on his clothes or person. First, although Robert Faherty now claims to have searched petitioner, his testimony at trial did not state this fact (Tr. 307). Moreover, testimony at trial did establish that petitioner had incriminating evidence on him in that petitioner had two scratch marks on his neck (Tr. 368-369, 406).[15]

b. The Inmate Affidavits Are Inconsistent and Incredible.

Although petitioner presented the District Court with a number of affidavits from inmates who proclaim petitioner's innocence, many of these affiants were questioned shortly after the incident and told investigators that they either did not witness the murder or would not

[15]Although petitioner claims that O'Neal was "dripping blood" while he had no blood on him (Pet. Brief at 43), petitioner fails to note that O'Neal sustained a large laceration after breaking the glass to dispose of the murder weapon (Tr. 299, 364).

state what they saw (J.A. 17).[16] Amazingly, eight years later these same individuals now graphically recall that petitioner was not involved. It is no wonder that the District Court rejected these affidavits as lacking credibility (J.A. 79). Fed. R. Civ. P. 52(a). Some of the affiants who have now come forward on petitioner's behalf even testified at the trial of petitioner's co-defendant, Rodnie Stewart, which occurred before petitioner's trial. In fact, John Green, upon whom petitioner heavily relies, testified at Stewart's trial.[17] Although petitioner claims these affiants did not come forward out of fear, one must question why the affiants, such as Green, felt no fear to testify at Stewart's trial but allegedly feared testifying at petitioner's trial approximately one year later.

The affidavits of Darnell White, Joseph Beck, Ricky McCoy and John Green not only contradict their prior statements to investigators, but also contradict each other (J.A. 143). For instance, White now states three white men, one carrying a tumbler, committed the murder although he told investigators he did not see anything (J.A. 143). Likewise, Beck now claims two individuals were involved in the murder even though he told investigators he did not see the murder but only saw a guy laying on the floor with blood coming out his mouth. In fact, he stated he did not see the murder because he was in his cell putting away a

[16]The piecemeal and dilatory nature of Petitioner's claims of actual innocence is demonstrated by the fact that petitioner claims to have located additional witnesses and that he intends to present these witnesses in a Rule 60(b) motion filed after completion of these proceedings. (Pet. Brief at 19 n. 24).

[17]Petitioner claims Green is a credible witness because Faherty's affidavit says so (Pet. Brief at 45 n 37).

broom.

Even though Lamont Griffin's affidavit stating that Stewart threw liquid in Dade's face while O'Neal stabbed Dade is consistent with his statement to investigators, he did not know "none of those dudes" (J.A. 143). Griffin's affidavit also claims that Sergeant Flowers grabbed the wrong guy although he told investigators that Sergeant Flowers grabbed the one who threw the liquid in Dade's face. McCoy, who was deposed by petitioner's counsel, stated that he just carried the stretcher and did not see the murder. McCoy's present affidavit contradicts both his statement to investigators and his testimony during his deposition. Petitioner also submitted affidavits from Emmett Nave, Dave Cocoran and Darnell Duckett. These individuals, however, were not even housed on Walks 1 through 4 (J.A. 18).

Likewise, petitioner's reliance on affidavits from O'Neal and Stewart, both of whom were charged and convicted for the same offense, is questionable at best. O'Neal's claim that petitioner was not involved is self-serving since he readily admits his participation in the murder of Dade but claims he acted alone and in self-defense. (J.A. 18). Stewart's affidavit also alleges petitioner was not involved. Stewart, however, maintains he is innocent while petitioner alleges that Stewart was involved. (J.A. 18). These conflicting theories are predictably self serving and patently contradictory.

As previously indicated, petitioner relies heavily on an affidavit from a former inmate named John Green. However, petitioner's theory that Green conclusively demonstrates that petitioner is actually innocent depends on which of the three versions Green has described that one

chooses to believe (J.A. 140). Green's first version was given to investigators on February 8, 1984. Green told investigators that he did not observe the murder. Rather, he told investigators that he was working as a clerk in the office when he heard Sergeant Flowers calling for help because there was a fight. Green stepped out of the office after hearing Sergeant Flowers call for help and saw Dade fall to the floor in front of the office. He stated that when Sergeant Flowers could not get anyone to assist him, Sergeant Flowers told Green to call base and notify them that a fight was in progress. (J.A. 140). Green's latest affidavit that he phoned in the stabbing within seconds of Dade hitting the floor is inconsistent with both the trial testimony, and Faherty's recent affidavit that petitioner was in his presence for two and one half to three minutes (Pet. Brief at 10).

Green's second version was presented at the trial of Rodnie Stewart on September 5, 1984 (J.A. 140). At Stewart's trial Green testified under oath that he was in the office when he heard Sergeant Flowers shouting "fight". He further testified that when he heard Sergeant Flowers shouting he got up and went to the office door and "just watched what was going on". While standing at the door Green saw Dade running towards the office where he was standing, and that he observed Dade run into Stewart near cell No. 43. After Dade collided with Stewart both men fell to the floor. He also observed Sergeant Flowers apprehend Stewart upon which he returned to the office and "waited there to find out what kind of report I was going to have to type up" (J.A. 140). On cross-examination Green acknowledged that he did not see the fight and that by the time he got up after hearing Sergeant Flowers shouting and walked to the door "[m]ost of the people in the walk had already left, went on down to the main line [dining room]"

and that the only individuals he saw still on the walk were Dade, Stewart and Dunn. Green also acknowledged that Sergeant Flowers was closer to the fight, a lot closer to the fight than he was, and that he knew the same day that the murder occurred that petitioner, O'Neal and Stewart had been picked up. In fact, he stated it was common knowledge among inmates that petitioner, O'Neal and Stewart were charged with the murder.

Green's third version was presented in his affidavit to the District Court during petitioner's Fed. R. Civ. P. 59(e) motion. Green's affidavit states that he was standing next to Sergeant Flowers at the 1 walk lever when he saw Jordan and O'Neal stab Dade (J.A. 139). His affidavit claims that he did not come forward earlier because he feared reprisal and because he did not know petitioner had been arrested.

Given these dramatic inconsistencies, petitioner's evidence falls far from the level required to establish that one is actually innocent. The inmate affidavits vary from O'Neal who claims he was the lone individual involved, to Beck and Griffin claiming only two individuals committed the murder, to White who claims three individuals were involved.[18] Petitioner does not negate an essential element of the offense.

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[18]Although petitioner claims that Green's affidavit points to Jordan as being the third participant in the murder, Green only names two individuals as being involved.

c. The Affidavit Of Robert Faherty Is False And Inconsistent.

The affidavit of Robert Faherty, a former prison guard, is suspect as well.[19] Faherty not only testified at petitioner's trial, but testified at the trial of Robert O'Neal and was deposed by petitioner's counsel long before petitioner's trial ever occurred (J.A. 140).[20]

Faherty's affidavit that no one asked him previously about relevant times is patently false. At O'Neal's trial, Faherty testified that he saw petitioner yelling out the window approximately one to two minutes before he received the radio transmission about the stabbing. He further testified that it took him thirty to forty-five seconds to get back to the housing unit after receiving the call. Moreover, petitioner himself testified at O'Neal's trial as a witness but did not refute Faherty's testimony. Nor did he ever indicate that he spent three minutes in Faherty's presence. In fact, petitioner testified at O'Neal's trial that Faherty "shook me down" and that the shake down took approximately twenty to thirty seconds. Petitioner's own testimony is inconsistent with Faherty's affidavit in which he now says petitioner was in his presence for three

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[19]The Court of Appeals noted that nothing in the record supports either petitioner's claim that Faherty retired or respondent's claim that he was fired (J.A. 138, n. 2). Faherty's affidavit was presented for the first time on appeal.

[20]Petitioner claims that Faherty was not asked the right questions at trial (Pet. Brief at 10 n 11). For instance, petitioner contends Faherty was not asked how long petitioner was in his presence (Pet. Brief at 10). However, the Court of Appeals found that Faherty was at the T-3 door for only ten to fifteen seconds (J.A. 140-41).

minutes.

Petitioner did not testify at the guilt stage of his trial. However he presented the testimony of two inmates, Bernard Bailey and Arthur St. Peters. Bailey testified that petitioner was in front of him going down the hallway to the dining room. He further stated that nothing unusual happened and that petitioner passed through the T-3 door and continued on to the dining room. Bailey never mentioned petitioner being stopped by Faherty. Nor did Bailey testify that Faherty stopped him. If Faherty had stopped petitioner for three minutes, as Faherty now claims, Bailey and St. Peters would have passed petitioner and would have been the first in the dining room which is contrary to the video tape.

The most significant testimony is that of Faherty himself at petitioner's trial. At petitioner's trial, Faherty testified that he manned the T-3 post for no more than ten or fifteen seconds (J.A. 140-41). If Faherty had manned the post for only ten or fifteen seconds how did he detain petitioner for three minutes at the T-3 post as Faherty now claims?[21] Nor did Faherty ever mention shaking down petitioner. Faherty testified that after he yelled at petitioner, petitioner proceeded past him into the direction of the dining room (J.A. 141). As previously stated, Faherty's last affidavit is not new evidence but rather evidence petitioner attempts to re-develop.

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[21]This may be the passage of time and erosion of memory problem this Court has previously discussed. Given that Faherty's memory of events would have been fresher at or near the time of the event rather than eight years later, the Court of Appeals correctly notes that the testimony at trial is more reliable.

Claims of actual innocence, asserted for the first time years after a conviction, have become disturbingly commonplace in federal habeas corpus litigation. *See, e.g., Smith v. Armontrout*, 888 F.2d 530, 540-44 (8th Cir. 1989), *stay denied*, 493 U.S. 1039 (1990); *Ellis v. Collins*, 956 F.2d 76, 78-79 (5th Cir.), *cert. denied*, ___, U.S. ___, 112 S.Ct. 1285 (1992). The collection of false and inconsistent affidavits which has been packaged by petitioner nine years after his conviction as "new" evidence of his innocence is not significantly different from claims by a large proportion of other inmates who file second or successive petitions at the last minute as they approach execution. This Court should hold, in accordance with *Sawyer*, that the new evidence petitioner presents fails to negate the elements of the crime of capital murder; thus, federal court review of petitioner's defaulted, abusive and successive claims are barred.

CONCLUSION

WHEREFORE, for the reasons herein stated, respondent respectfully requests that this Court apply the standard announced in *Sawyer* to guilt phase issues and find that petitioner failed to establish a fundamental miscarriage of justice and affirm the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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